

The contention of counsel for the appellant to which I now turn derives from an observation of Gill J. in *Karuthan Chettiar v. Parameswara Iyer* ⁽⁵⁾ where the learned judge took the view that the statement of account exhibited to the plaintiff or his agent was not fatal to the plaintiff's case so long as "the statement of account was produced by the moneylender or his money-lending agent or their solicitors, who must be treated as their agents for the purpose of production of the accounts".

In my view, *Palaniappa Chettiar's* case can be explained in this way. It was a case commenced by way of originating summons supported by affidavit to which an unsigned statement of account was exhibited (R.S.C., O. 55 r. 5a). As the originating summons is not a statement of claim and therefore not a pleading (see *Lewis v. Packer* ⁽⁶⁾), the statement of account does not form part and parcel of the summons and therefore the statement of account must be signed in accordance with section 21. That seems to be the *raison d'être* underlying the second limb of the judgment in that case. But the matter does not rest there. In the circumstances of the case, the court went further to hold that on the authority of *In Re Hinchliffe* ⁽⁷⁾ an exhibit to an affidavit and therefore the unsigned statement of account referred to in the affidavit was part and parcel of the affidavit with the result that the said statement is in compliance with section 21.

The present case is different. It was commenced by a statement of claim signed by the moneylender's solicitors. The signature is a voucher that the case is not a mere fiction (*per* James L.J. in *Grant Australian Gold Mining Co. v. Martin* ⁽⁸⁾). The statement of claim is a pleading. Any document referred to in the pleading becomes part and parcel of the pleading (see *Day v. William Hill* ⁽⁹⁾). Therefore the statement of account becomes part and parcel of the statement of claim. In the circumstances I am in accord with the observation of Gill J. in *Karuthan Chettiar v. Parameswara Iyer, supra*, that as long as the statement of account is produced, that is, it is attached to the statement of claim, that is in compliance with the provisions of section 21 and it is immaterial whether it is produced by the moneylender himself or by his solicitors who must be deemed to be his agents for the purpose of instituting the proceedings. The present appeal is sufficient to dispel the specious doctrine that an unsigned statement of account attached to a statement of claim transgresses the provisions of section 21.

I will therefore allow the appeal with costs. As the learned magistrate has been posted elsewhere in a different capacity, this case should be tried before another magistrate.

Appeal allowed. Re-trial ordered.

Solicitors: *K. L. Devaser & Co.; Nadchattirams.*

ISMAIL v. HASNUL;
ABDUL GHAFAR v. HASNUL

[F.C. (Azmi C.J. (Malaya), Raja Azlan Shah & Gill JJ.)
November 17, 1967]

[K.L. — Federal Court Civil Appeal No. X. 70 & X. 63
of 1967]

Practice and Procedure — Subpoena ad testificandum enforcing attendance of witness — Application to set aside — Court's power to restrain abuse of power.

Evidence Ordinance 1950, s. 11 — Scope of.

An action for slander was brought by Tun Tan Siew Sin, Minister of Finance against the respondent in Civil Suit No. 38 of 1964. The respondent totally denied making the defamatory statements which were published in *Utusan Melayu* and imputed to him. In order to establish this line of defence, the respondent intended to call the appellants as his witnesses to testify that on other occasions *Utusan Melayu* had published defamatory statements purported to have been made of the respondent by the appellants and subsequently the appellants had requested *Utusan Melayu* to publish denials of such statements. Writs of *subpoena ad testificandum* were accordingly issued and served on the appellants requiring their attendance to give evidence for the defence at the trial of the slander action. Both appellants separately applied by summons in chambers to set aside the writs as vexatious and an abuse of the process of the court. These applications being adjourned into open court and heard, were dismissed by the judge ([1967] 2 M.L.J. 191).

On appeals by the appellants before the Federal Court, the question for decision was whether the issue of these *subpoenas* on the appellants was an abuse of the process of the court.

Held: (1) in the pending action whether or not the plaintiff had slandered the respondent was the main issue. Both the appellants in their affidavits, denied knowledge or their ability to give evidence on any relevant issue in such action, further the 1st appellant categorically denied ever requesting *Utusan Melayu* at any time to make corrections of defamatory statements. The evidence which the respondent was seeking to establish was evidence of collateral facts not reasonably conclusive even if established, and which have no connection with the main fact in the defamation suit. It was therefore, not apparent in what way the appellants could give any relevant evidence to assist the defence;

(2) for the above reasons it is difficult to see in what way the appellants can give relevant evidence to assist the defence. In the particular circumstances of this particular case the court has a right to protect the appellants from the practice and process of this court being used simply for a matter that is misconceived and not for the purposes of justice.

Per Raja Azlan Shah J.: "The practice in all courts has been that a *subpoena* may be issued against anybody, be he a Minister of the Government or a nonentity. It cannot be gainsaid that a Minister has any more privilege than that enjoyed by a member of the public. Injustice will arise if equals are treated unequally. But the court possesses inherent jurisdiction to see that this privilege is properly exercised and in a proper case can restrain its abuse."

Cases referred to:—

- (1) *Raymond v. Tapsen* (1882), 22 Ch. D. 435.
- (2) *R. v. Hurler-Hobbs* [1945] K.B. 165.
- (3) *Steel v. Savory* 8 T.L.R. 94.
- (4) *R. v. Baines* 25 T.L.R. 79.
- (5) *Barratt v. Long* (1851), 3 H.L.C. 395.
- (6) *Pearson v. Lemaitre* (1843), 5 M. & G. 742.
- (7) *Astaire v. Campling* [1965] 3 All E.R. 666.
- (8) *Rustell v. Macquister* 1 Campb. 49.
- (9) *Saunders v. Mills* 6 Bing. 213.
- (10) *Turner v. M.G.M. Pictures Ltd.* [1950] 1 All E.R. 449, 445.

FEDERAL COURT.

Ajaib Singh (Senior Federal Counsel) for the appellant Ismail.

G. T. S. Sidhu for the appellant Abdul Ghafar.

T. T. Rajah for the respondent.

Cur. Adv. Vult.

Azmi C.J. (Malaya): I have had the advantage of reading the judgment of my brother Mr. Justice Raja Azlan Shah and agree with him that the appeals should be allowed with costs here and in the court below. The order of the court below and the *subpoena* issued against the appellant be set aside.

The deposit made by the two appellants be paid back to them.

Raja Azlan Shah J.: An action for slander had been commenced by Tun Tan Siew Sin, Minister of Finance, against the respondent Inche Hasnul bin Abdul Hadi in Malacca High Court Civil Suit No. 38 of 1964. It arose out of a statement alleged to have been made by the respondent of and concerning the plaintiff at an election rally held at Pekan Ayer Molek, Malacca, on 5th April, 1964, and published in the *Utusan Melayu* of 7th April, 1964. The same slander was repeated by the respondent at another election rally held at Bertam Ulu Village, Malacca, on the evening of 7th April, 1964. In view of the pending trial it is wise to say as little as possible about the case. Assuming that the defamatory statements were made by the respondent, there is established a series of publications each of which constitutes a separate tort. First, there is the publication by the author, that is, the respondent, to the audience at the two rallies for which he is solely responsible. Secondly, there is the publication by the printers and publishers of *Utusan Melayu* for which the author, the printers and publishers are jointly liable. In Civil Suit No. 38 of 1964 the plaintiff, as can be seen from the endorsement of his writ, sues for slander against the respondent as the author of the defamatory words spoken of him at the election rallies.

The defence is a total denial. It is the respondent's case that both the appellants can give

- A material and relevant evidence to establish the defence contention that the alleged defamatory words published in *Utusan Melayu* and purported to have been uttered by the respondent are fabricated by *Utusan Melayu* against the respondent. In other words, the respondent says he did not make the defamatory statements as published by *Utusan Melayu* but that in all probability they were published by the appellants.
- B In order to establish that, he intends to call the appellants as his witnesses to testify that on some other occasions *Utusan Melayu* had published defamatory statements purported to have been made of the respondent by the appellants and that subsequently they had requested *Utusan Melayu* to publish denials of such statements.
- C

Writs of *subpoena ad testificandum* were accordingly issued and served on Tun (Dr.) Ismail bin Dato' Haji Abdul Rahman, the then Minister of Home Affairs, (the first appellant), and Inche Abdul Ghafar bin Baba, the then Chief Minister of Malacca, (the second appellant), to give evidence for the defence at the trial of the above-named suit. Both appellants thereupon filed separate applications by way of summons-in-chambers to set aside the writs as vexatious and an abuse of the process of the court. The proceedings were adjourned into open court and judgment was given against the appellants. They have now appealed against that interlocutory order. The judgment of the learned judge contains a concise and clear summary of the issues and arguments, and his reasons for dismissing the applications are as follows:—

- F "It is clear from the record that both the 1st and the second applicants were not present on those occasions when the defamatory words were alleged to have been uttered by the defendant and they can, therefore, be of no assistance to the defence as to the actual words uttered by the defendant on those occasions. However, both the 1st and the 2nd applicants have had experience of gross misreporting of their own speeches regarding the defendant's character by the *Utusan Melayu* on some other occasions and this piece of evidence, in my view, is indirectly relevant and material to the defence case."
- G

- H What are the facts? The first appellant says he has no knowledge whatsoever of the facts or the merits or demerits of the defamation suit between the plaintiff and the respondent either personally or in his official capacity as Minister of Home Affairs and as such he could not give relevant evidence. Before us a further affidavit was filed in which the first appellant categorically denies that he had ever requested *Utusan Melayu* at any time either verbally or in writing to make unnecessary corrections of defamatory statements made by him of the respondent. In reply, the respondent referred us to documents in his possession which he says established the fact that the first appellant had libelled him at an U.M.N.O.* rally at Batu Pahat on 2nd April, 1964, and at the respondent's request the first
- I

* United Malay National Organisation.

appellant had directed *Utusan Melayu* to make the necessary corrections. As these are important documents for present consideration it is necessary to reproduce them. The first letter dated 3rd April, 1964, was written by the former solicitors for the respondent to the first appellant.

"Dato' Dr. Ismail bin Dato' Haji Abdul Rahman,
c/o Ministry for Internal Affairs,
Kuala Lumpur.

Sir,

As solicitors for Inche Hasnul bin Abdul Hadi the President of the Municipal Councillors of the Town and Fort of Malacca and a Malay leader of an opposition party against whom Government has recently taken action by arrest and detention without trial we beg to draw your attention to a report on the front page of the *Utusan Melayu* of the 3rd April, 1964, in which you appear to have stated at an UMNO Rally at Batu Pahat on the 2nd April, 1964, that the action taken was because our client was a traitor to his country and race. Our client strongly denies your accusation and is prepared to take an oath on the Holy Koran in the Kampong Hulu Mosque to rebut your accusation.

The newspaper article (which we have sent to the court for official translation) appears to contain a libel on our client and we hereby demand on our client's behalf your assurance by return that you will arrange for a suitable amendment or withdrawal insofar as the matter complained of referred to our client to be published without delay and your undertaking that if you did utter the words complained of there will be no repetition of the same or similar words.

We have the honour to be,
Sir,
Your obedient servants,
(Sd.) Allen, Gledhill & Ball."

The secretary to the Ministry of Home Affairs replied on behalf of the first appellant on 20th April, 1964. In it he says that the said publication was not a verbatim nor an accurate version of what had been said by the first appellant at the rally. It had left out the first part of his speech which concerned the confessions of the two Malay opposition leaders to acts of treason, and with this omission in the newspaper article the rest of his speech would be interpreted in a different context which might be objectionable. The secretary adds that the first appellant had requested *Utusan Melayu* to publish the omission, the translation of which is as follows:—

"The Editor,
Utusan Melayu,
Kuala Lumpur,

Sir,

I refer to the the article entitled 'Minister explains why Government detained leaders of opposition party' which was published in your paper of 3rd April, 1964.

I wish to say that the article did not contain my speech in full, and I regret that portions of it were omitted.

It is true that at the beginning of my speech I mentioned the confessions made by two opposition party leaders regarding their intentions and acts of treason committed by them. Their confessions were broadcast by Radio Malaysia and were filmed by Filem Negara.

When I said that they committed acts of treason against the Government and country I was referring to these two people.

This is all I have to inform you.

(Sd.) Dato' Dr. Ismail bin
Dato' Haji Abdul Rahman.

Menteri Hal Ehwal Dalam Negeri".

An analysis of these documents shows that the first appellant had drawn the attention of *Utusan Melayu* to their publication of 3rd April, 1964, in which the newspaper article did not fully report his speech of 2nd April, 1964, at Batu Pahat and had requested the omission to be published. The omission bears reference to the confessions made by the two opposition party leaders and later broadcast by Radio Malaysia and filmed by Filem Negara. That is the type of evidence the respondent intends to offer through the first appellant. Is that evidence relevant in a defamation suit between the plaintiff and the respondent?

The second appellant says he is unable to give evidence which can be relevant to any issue which may arise in the defamation suit as he was not present on any of those occasions when the defamatory statements were alleged to have been uttered by the respondent.

Mr. T. T. Rajah has referred us to two articles published in the *Utusan Melayu* of 29th and 30th December, 1964, which he says afford assistance to his case. The article of 29th December contains a speech of the second appellant in which he is alleged to have expressed his doubts whether the respondent is a spy of Indonesia or Peking. He is alleged to have made this comment on the speech delivered by the respondent at Kubu padang the previous evening in which the respondent had said that if Malaysian representatives participate in the forthcoming Afro-Asian Conference in Algeria, China, Indonesia and other countries would leave the said conference. In my view it is obvious that *Utusan Melayu* had misquoted the second appellant's speech, for on the following day *Utusan Melayu* published another article to announce that the second appellant had issued a statement denying he had ever mentioned the respondent's name or the word "spy" in his speech, still less of his doubts whether the respondent is a spy of Peking or Indonesia. What the second appellant had meant by his speech was his doubt of the speech made by a politician who had said that Malaysia would be ousted from the forthcoming Afro-Asian Conference and if Malaysia persisted in attending the said conference, Indonesia and Communist China would stage a walk-out. The second appellant accordingly posed a question whether by the respondent's speech he was an official spokesman for the Governments of Indonesia or Communist China.

The practice in all courts has been that a *subpoena* may be issued against anybody, be he

a Minister of the Government or a nonentity. It cannot be gainsaid that a Minister has any more privilege than that enjoyed by a member of the public. Injustice will arise if equals are treated unequally. But the court possesses inherent jurisdiction to see that this privilege is properly exercised and in a proper case can restrain its abuse: see *Raymond v. Tapson*.⁽¹⁾ In three well-known instances the court has set aside a *subpoena* as an abuse of its process. In *R. v. Hurlle-Hobbs*⁽²⁾ the court had no power to issue it. *Steel v. Savory*⁽³⁾ was a case of oppression. In *R. v. Baines*⁽⁴⁾ the witness could give no relevant evidence. It is plain that these decisions do not enumerate all the cases which fall under this head. Each case must in the last analysis depend on the evaluation of its own facts. The short question which this court has to enquire is whether its process issued against the appellants has been abused. In determining that question it is necessary to examine the law.

In an action for libel or slander malice is a matter in issue, and anything that raises the probability of the existence or otherwise of the matter in issue is relevant. Now, malice may be inferred from other defamatory statements made of the plaintiff by the defendant. *Barratt v. Long*⁽⁵⁾ is a case which was concerned with prior statements, and *Pearson v. Lemaitre*⁽⁶⁾ exemplified the class of cases dealing with subsequent statements. To be actionable, the statement must itself be false and defamatory of the plaintiff; if it is innocent, it is not possible by pleading innuendos to make the defendant responsible for defamatory statements by other persons which are not either expressly or by implication been proved, adopted or repeated in the statement by the defendant in respect of which the action is brought. See *Astaire v. Campling*.⁽⁷⁾ It may be convenient to observe that in all these cases it was the plaintiff who had brought in evidence of similar defamatory statements in order to establish malice.

Reference is made to a passage of Tindal C.J. in *Pearson v. Lemaitre*⁽⁶⁾ at page 749 which is said to be in favour of the respondent:—

‘Either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but that, if the evidence given for that purpose establishes another cause of action, the jury should be cautioned against giving any damages in respect of it. And if such evidence is offered merely for the purpose of obtaining damages for such subsequent injury, it will be properly rejected’.

In that case the letter written by the defendant to one “S”, the subject of the libel suit, was a privileged communication, and therefore it was held that the two subsequent letters written by the defendant to other parties, containing a repetition of the same libel were not admissible for the purpose of answering by anticipation an untenable proposition. A further submission

A advanced by the appellant was that the subsequent letters explained the motives by which the defendant was actuated in writing to “S”, and that with a view to the damages to be recovered the plaintiff was entitled to prove that the defendant was actuated by malice in fact. The learned Chief Justice, before delivering judgment, referred to the case of *Rustell v. Macquister*⁽⁸⁾ where Lord Ellenborough expressed the view that “you may give in evidence any words, as well as any act, of the defendant, to shew *quo animo* he spoke the words which are the subject of the action”. *Saunders v. Mills*⁽⁹⁾ was also referred to, in which it was held that in mitigation of damages a defendant has been allowed to give evidence palliating, though not justifying, his act in publishing a libel, e.g. that he copied it from a newspaper. The appellant’s latter proposition found expression in the above-quoted passage of the learned Chief Justice who then continued, “. . . But, upon principle, we think that the spirit and intention of the party publishing a libel, are fit to be considered by a jury, in estimating the injury done to the plaintiff; and that evidence tending to prove it, cannot be excluded simply because it may disclose another and different cause of action”. In my view, that case goes no further than demonstrating in a compendious form the principle that evidence of similar defamatory statements made of the plaintiff by the defendant is relevant in showing the existence or absence of malice at the time of the wrong, and that its practical effect is that the damages will fluctuate according to the degree of culpability of the defendant’s behaviour.

The principle in *Pearson v. Lemaitre*, *supra*, as simplified by Lord Porter in *Turner v. M.G.M. Pictures Ltd.*⁽¹⁰⁾ as “examples so connected with the state of mind of the defendant” cannot be extended beyond its four walls, for to do so would be to put a gloss on the principle itself. The principle would apply if there are in evidence any words as well as any acts of the defendant to prove or disprove the existence of malice in publishing the defamatory statement which is the subject of the action. In the light of the defence in the pending defamation suit, i.e. that the respondent denies publishing the alleged defamatory statements but attributes it to the appellants, it is hardly necessary for him to disprove malice, and therefore the application of the above-quoted principle bears no relevance.

It is then said that the case comes within the province of section 11 of the Evidence Ordinance, 1950. That section no doubt is expressed in terms so extensive that any fact which can, by a chain of ratiocination, be brought into connection with another, so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning. But it has its limitation. It does not admit of collateral facts

which are not reasonably conclusive and which have practically no connection with the main fact. In the pending defamation suit, whether the respondent had slandered the plaintiff, is the main fact. Evidence of other defamatory statements made of the plaintiff by a third party, for example the appellants, are relevant under this section in showing the probability that the slander was uttered by the third party. But the section does not come into play in the pending suit when a third party has libelled the respondent because that is extraneous to the main fact. Further, the collateral facts are not conclusive as the appellants had categorically denied publishing the defamatory statements on other occasions.

For the above reasons it is difficult to see in what way the appellants can give relevant evidence to assist the defence. In the particular circumstances of this particular case the court has a right to protect them from the practice and process of this court being used simply for a matter that is misconceived and not for the purposes of justice. The appeal is allowed.

Gill J. concurred.

Appeal allowed.

Solicitors: *Koh Kim Leng & Co.; T.T. Rajah.*

RE LEE CHEW KUEN, DECD.

[O.C.J. (Kulasekaram J.) November 20, 1967]

[Singapore — Originating Summons No. 146 of 1967]

Will — Construction of — Testator providing for two eventualities — Presumption arising in case of commorientes — Appointment of wife as executrix if she survives testator for 30 days — Need for construction of will — Intention of testator — Presumption against intestacy — Supplying missing words to make clear the intention of testator.

The testator Lee Chew Kuen preparing to travel to Europe with his wife and two young daughters made a will at a solicitor's office. The plane in which they travelled crashed and all four were killed.

By reason of commorientes the younger are deemed to have survived the elder of them, such situation not being specifically expressed by the will in so many words. It gave rise to two questions regarding construction which were submitted to court for their determination in this Originating Summons, viz., (a) whether the estate of Kittie Chan Wai Hing, widow of the deceased was entitled under the will to a share in his estate, (b) whether estates of the two daughters Dolly Lee and Patricia Lee who died before attaining 21 years of age and unmarried were entitled to any share under the will of the deceased (father).

Held: (1) upon a true construction of the will of Lee Chew Kuen deceased and in the events which have happened, the estate of Kittie Chan Wai Hing, the widow of the said deceased is not entitled to a share in his estate;

(2) upon a true construction of the will of the testator the estates of Dolly Lee and Patricia Lee are not entitled to a share under the will.

A ORIGINATING SUMMONS.

N. A. Mallal for persons interested in arguing that neither the estate of Kittie Chan nor the estates of Dolly Lee and Patricia Lee was or were entitled to a share under the will

B *C. C. Tan* for person interested in arguing that the estates of Dolly Lee and Patricia Lee were entitled to their respective shares under the will.

A. S. Verick (State Counsel) for persons interested in arguing that the estates of Kittie Chan was entitled to a share under the will.

C *Juliet Toh* (Mrs.), for the trustees of the will.

Cur. Adv. Vult.

Kulasekaram J.: In this application two questions regarding the construction of the will of Lee Chew Kuen, deceased, have been submitted to this court for their determination.

D They are:—

(1) Whether upon the true construction of the said will of the abovenamed Lee Chew Kuen, deceased, and in the events which have happened the estate of Kittie Chan Wai Hing, the widow of the said deceased, is entitled under his will to a share in his estate.

(2) Whether upon the true construction of the said will and in the events which have happened the estates of the deceased's two daughters, namely, Dolly Lee Wing Yee and Patricia Lee Yuet Hang, who died before attaining 21 years of age and unmarried, are entitled to any share under the will of the deceased.

Those portions of the will that are relevant to these two questions are paragraphs 2 to 6 of the will and they are as follows:—

G "2. In the event of my wife Kittie Chan Wai Hing surviving me for a period of thirty days from my death I appoint her and John Francis Lancelot Cowin of No. 219 Belmont Road, Singapore, chartered accountant, (hereinafter referred to as "my trustees") to be the executors and trustees of this my will and to be the guardians of my infant children and I give and bequeath to my said wife absolutely all articles and effects of household domestic or personal use ornament or consumption belonging to me and not otherwise specifically bequeathed.

H 2. As to all the rest of my estate and effects of whatsoever nature and wheresoever situate I devise and bequeath the same unto my trustees upon trust to sell call in and convert the same into money with full power to postpone such sale calling in or conversion and out of the moneys to arise from such sale calling in or conversion to pay my funeral and testamentary expenses and debts and to stand possessed of the residue of the said moneys and the investments for the time being representing the same in trust as to one-third (1/3rd.) share thereof for my said wife and as to the remaining two-thirds (2/3rds.) share thereof in trust for each of them my four daughters Dolly Lee Wing Yee, Patricia Lee Yuet Hang, Winnie Lee Voon Ee, Adelaide Lee Lian Seng and my son Arthur Lee King Chi as shall be living at my death and if more than one in equal shares except